Celcom (M) Sdn Bhd v Sarawak Electricity Supply Corp

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO Q-02-996 OF 2001
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
8 NOVEMBER 2002

Arbitration — *Stay of proceedings — Whether there was a dispute between parties*

Arbitration — *Stay of proceedings — Principles applicable*

The plaintiff and the defendant entered into a joint venture agreement ('the agreement'). The agreement contained an arbitration clause. The parties also agreed under cl 15.2(a)(iii) of the agreement that if either of them entered into a composition or arrangement with creditors, that would constitute an act of termination. The plaintiff alleged that the defendant had in fact entered into such an arrangement with the effect that cl 15.2(a)(iii) had been activated and defendant became immediately obliged to sell and transfer its shares to the plaintiff pursuant to cl 15.3. The plaintiff subsequently issued a writ and the defendant applied to stay proceedings under s 6 of the Arbitration Act 1952. The judge subsequently refused the application. On appeal, the question was whether there was any dispute to go to arbitration. It was the plaintiff's case that there was nothing to go to arbitration.

Held, dismissing the appeal with costs, deposit to be paid to respondent (plaintiff) to account of taxed costs:

(1) The burden on the defendant was very light. All the defendant had to show was an agreement coupled with an assertion that it was ready and willing to go to arbitration. Once these elements were satisfied and provided there was some dispute to go to arbitration, the defendant should have its stay of proceedings (see pp 597B–C).

(2) There must be a dispute falling within the scope of the arbitration clause or agreement. If there be no dispute, there is nothing to refer to arbitration. On the facts, it was quite plain from the defendant's letter to the Sarawak State Secretary that the defendant was ready and willing to dispose of its shares to the plaintiff. That being the case, the mechanism provided by the agreement for the determination of the value of shares would be automatically triggered. Once that mechanism applied, the arbitration clause ceased automatically to have any relevance. There was simply no dispute as to whether there had been an arrangement entered into between the defendant and its creditors. The point had to be assumed to go by default in the plaintiff's favor. There was thus no dispute falling within the arbitration clause (see p 597C–D, F, I 598A); *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 followed.

(3) On the totality of the evidence that was placed before the learned judge, he was amply entitled to conclude that a stay ought to be refused (see p 598D).

[Bahasa Malaysia summary

Plaintif dan defendan telah memasuki satu perjanjian usahasama ('perjanjian tersebut'). Perjanjian tersebut mengandungi peruntukan timbang tara. Kedua-dua pihak bersetuju di bawah kl 15.2(a)(iii) perjanjian tersebut bahawa sekiranya salah satu antara mereka membuat komposisi atau penyusunan dengan pemiutang maka perjanjian tersebut akan terbatal. Plaintif mendakwa bahawa defendan telah memasuki suatu penyusunan dengan pemiutang dan dengan itu kl 15.3 telah diaktifkan. Oleh itu, defendan wajib menjual dan memindahkan sahamnya kepada plaintif. Plaintif seterusnya mengeluarkan writ dan defendan memohon penggantungan prosiding di bawah s 6 Akta Timbangtara 1952. Hakim telah menolak permohonan tersebut. Semasa rayuan, isu adalah samada wujudnya sebarang pertikaian untuk ditimbangtarakan. Adalah merupakan kes plaintif bahawa tiada pertikaian untuk ditimbangtarakan.

Diputuskan, menolak rayuan dengan kos, deposit dibayar kepada responden (plaintif) bagi akaun kos yang ditaksirkan:

(1) Beban ke atas defendan adalah amat ringan. Defendan hanya perlu menunjukkan satu perjanjian serta membuat pernyataan bahawa defendan sedia dan rela dihadapkan ke timbangtara. Sebaik sahaja elemen-elemen ini dibuktikan dan terdapat sesuatu pertikaian untuk dihadapkan ke timbang tara, maka defendan harus mendapatkan pelaksanaan prosiding (lihat ms 597B–C).

(2) Satu pertikaian dalam lingkungan skop peruntukan timbangtara ataupun perjanjijan tersebut mesti wujud. Sekiranya tiada sebarang pertikaian maka tiada sebarang isu untuk ditimbangtara. Berdasarkan fakta-fakta, adalah jelas dari surat defendan kepada Setiausaha Negeri Sarawak bahawa defendan sedia dan rela melepaskan sahamnya kepada plaintif. Memandangkan sedemikian, mekanisme perjanjian tersebut mengenai penentuan nilai saham diaktifkan secara automatik. Sebaik sahaja mekanisme tersebut diaktifkan, maka peruntukan timbangtara secara automatik tidak lagi relevan. Tidak dipertikaikan sama ada terdapat sebarang penyusunan di antara defendan dan pemiutangnya. Isu ini, secara ingkar dianggap menyebelahi plaintif. Maka tidak timbulnya sebarang pertikaian yang jatuh dalam lingkungan peruntukan timbangtara (lihat ms 597C–D, F, I,598A); *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 diikut.

(3) Pada keseluruhan keterangan yang dihadapkan kepada hakim yang arif, beliau berhak memutuskan bahawa permohonan penggantungan harus ditolak (lihat ms 598D).]

Notes

For cases on principles applicable in arbitration, see 1 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1038–1046.

Cases referred to

Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 (folld)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)

Appeal from: Suit No 22–103–01 of 2001 (High Court, Kuching)

James Lo (*George Lo & Partners*) for the appellant.

Sim Hui Chuang (*Lim Lip Sze* with him) (*Reddi & Co*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): There is only one issue in this appeal. It is whether the learned judge was right in refusing to stay the action pending reference to arbitration. The factual matrix relevant to this appeal may be shortly stated.

The parties (whom we shall refer to as the plaintiff and the defendant respectively) entered into a joint venture agreement dated 5 May 1994. The purpose of the agreement was to set up a limited company which was to operate as a vehicle to carry out the business operation which the plaintiff and the defendant proposed to carry on in the state of Sarawak. That agreement contains an arbitration clause. It is cl 18. It reads:

> If any dispute or difference shall arise between the parties hereto touching any clauses, matter or thing whatsoever herein contained or the operation or construction thereof or any matter or thing in any way connected with this Agreement or the rights, duties or liabilities of either party under or in connection with this Agreement, then and in every such case the dispute or difference shall first be resolved between the Parties for an amicable settlement failing which shall be referred to a single arbitrator in case the parties agree upon one or otherwise to two arbitrators one to be appointed by each party or to the Kuala Lumpur Regional Centre for Arbitration at No 12, Jalan Conlay, 50450 Kuala Lumpur and shall be held in accordance with the provisions of the Arbitration Act, 1952 (Revised 1972) or any statutory modification or re-enactment thereof for the time being in force. The award of the arbitrators shall be final and binding.

One of the points on which the parties had agreed under the joint venture agreement was that if either of them enter into a composition or arrangement with creditors, that would amount to an act of termination (cl 15.2(a)(iii)).

The plaintiff later alleged that the defendant had in fact entered into such an arrangement with its creditors. It said that cl 15.2(a)(iii) has been activated. The consequence is that the defendant became immediately obliged to sell and transfer its shares to the plaintiff. That is to be found in cl 15.3.

By a letter dated 24 November 2000, the defendant invoked the arbitration clause and proposed to appoint an arbitrator nominated by it.

That was followed by some silence and inactivity on both sides. The plaintiff did not take any step to prosecute the action further. On its part, the defendant did not take any action to appoint an arbitrator. So the dispute lay dormant.

On 3 August 2001, the plaintiff issued its writ. The defendant applied to stay those proceedings under s 6 of the Arbitration Act 1952. The plaintiff opposed the application and, as we said, when we opened this judgment, the learned judge refused the application. The question is whether there is any dispute to go to arbitration.

So far as the law is concerned, there is no controversy. The essential principles are to be found in the judgment of Edgar Joseph Jr SCJ in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 108:

> It is clear law, scarcely needing any express authority, that for the grant of a stay, the applicant must demonstrate to the court by affidavit evidence (*Piercy v Young* [1880] 14 Ch D 200 at p 209) that both at the time when proceedings were commenced and to the time when the exercise of the court's discretion is sought for the grant of a stay, that he is ready and willing to do all things necessary to the proper conduct of the arbitration. The onus on the plaintiff is to satisfy the court, not so much that he has a right to continue, but that he ought to be allowed to continue the action. It goes without saying that the discretion reposed in the court is a judicial one to be exercised having regard to the particular circumstances of each case.(see *Phoenix v Pope* [1974] 1 All ER 512).
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> In the present case, the contractor's director, Chan Nung Wai, had deposed by para 6 of his affidavit dated 28 November 1991, filed in support of the summons for stay, that:
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> > 'At the time this action was commenced, I was, and I remain, ready and willing to do all things requisite to enable all the matters in dispute as aforesaid to be determined by arbitration in accordance with the provisions of the said agreement.'
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> This para was taken straight from 6 *Atkins' Court Forms* (2nd Ed, 1989). Nowhere in the affidavit in opposition filed on behalf of the sub-contractor was that assertion contradicted.
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> However, the judge took the view that an oath merely affirming that an applicant for a stay is 'ready and willing to do all things necessary for the arbitration' is insufficient, and that therefore, as the termination in the present case appeared to have been done with dubious intent, it was for the trial judge to determine whether the termination of the sub-contract was right or wrongful in subsequent breach of contract proceedings. The judge also pointed out that although both parties had the benefit of legal advice, the

A contemporary correspondence did not show a desire or intention on the part of the contractor to refer the disputes to arbitration.

> The judge failed to recognize that at such an early stage, there is little a defendant is obliged to do in the arbitration beyond asserting a willingness to appoint an arbitrator and this, of course, means that the plaintiff will be hard put to refute the assertion.

B Thus, the burden on the defendant is very light. All he needs to show is an agreement to arbitrate coupled with an assertion by him that he is ready and willing to go to arbitration. Once these elements are satisfied, and provided there is some dispute to go to arbitration, that is to say a dispute that falls within the scope of the arbitration clause, then it normally follows, as night C follows day, that the defendant should have his stay of proceedings.

The important qualification to which this principle is subject is housed within it. It is that there must be a dispute falling within the scope of the arbitration clause or agreement. If there be no dispute, then it follows that there is nothing to refer to arbitration. This qualification is illustrated by D *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177.

In the present instance, it is the plaintiff's case that there is indeed nothing to go to arbitration. In support of that argument, Mr Sim for the plaintiff (the respondent before us) has drawn our attention to a letter dated 3 January 2001, written by the defendant to the State Secretary of Sarawak. Shorn of its formalities, this is what the letter says:

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> Pursuant to our discussion this morning, we would like to confirm our intention to dispose our sixty percent equity interest in CTS to the State of Sarawak subject to the price and other terms to be mutually agreed later by both parties.

F It is quite plain from this letter that the defendant was indeed ready and willing to dispose of its shares to the plaintiff. It is an obvious concession by the defendant that cl 15.3 applies. That being the case, the mechanism provided by the joint venture agreement for the determination of the value of the shares would be automatically triggered. This is contained in cl 12.8. It is not a cursory mechanism. It goes into fine details. We had better set it G out. This is what cl 12.8 says:

> For the purpose of this clause, the expression 'fair market value' shall mean such amount as shall be agreed upon between the offeror and the offeree, failing which the Company shall have an independent qualified Auditors to be mutually appointed by the Parties to ascertain the current market value of the shares at the expense of the offeror. The company shall instruct the said H auditors to prepare such a certificate within forty five (45) days and a copy of such certificate shall upon receipt by the company be forthwith dispatched to both Parties hereto. In certifying the value of such shares, the said Auditors shall be acting as experts and not as arbitrators and their valuation shall in the absence of manifest error be accepted as final by the Parties. The offeror shall bear the cost of the valuation which, unless settled by the offeror, shall become I a first charge against the purchase price of the shares.

Once the valuation mechanism clause applies, the arbitration clause ceases automatically to have any relevance. There is simply no dispute as to

whether there had been an arrangement entered into between the defendant and its creditors. That point must be assumed to go by default in the plaintiff's favor. Mr Sim is therefore quite correct in his argument that there is no dispute falling within the arbitration clause.

Mr James Lo of counsel for the defendant (the appellant before us) has made much of a passage in the judgment of the learned judge which he says demonstrates a concession by the judge that there is a dispute. Further, the learned judge in the concluding paragraph of his judgment held against the defendant on the ground that there was no willingness and readiness on its part to arbitrate.

Even if, we are prepared to agree with Mr James Lo's argument in respect of the first point, that is to say the dispute point, and granting that the learned judge misdirected himself in the final paragraph, having regard to the decision in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd*, it does not in our view make any difference so far as the defendant is concerned. On the evidence before us, we are satisfied that the decision of the learned judge is correct. The prima facie errors to which we have referred ought not in our judgment be visited upon the plaintiff's head. On the totality of the evidence that was placed before the learned judge, he was amply entitled to conclude that a stay ought to be refused. That was the order he made. We agree with him.

This appeal is therefore devoid of any merits. It is dismissed. The respondent will have its costs here. The deposit is to be paid to the respondent to account of taxed costs.

Appeal dismissed with costs, respondent (plaintiff) be paid the deposit to account of taxed costs.

Reported by Andrew Christopher Simon